84-699

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AND NATIONAL CLASSIFICATION COMMITTEE,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

(1) Whether the Interstate Commerce Commission has statutory power to order cancelled a collectively made tariff filed with that agency by motor common carrier members of the National Motor Freight Traffic Association because of alleged violations of 49 U.S.C. § 10706(b)(3)(B)(iv) and (v), without the agency first finding that the collective activity of the carriers violated the terms of their agreement filed with the agency under 49 U.S.C. § 10706(b), or that the procedures contained in the carriers' agreement violated 49 U.S.C. § 10706(b)?

(2) Embraced in this question are the subsidiary questions of (a) Whether the Interstate Commerce Commission correctly interpreted the explicit prohibition in 49 U.S.C. § 10706(b)(3)(B)(iv) against docketing a proposal and acting on such proposals by rate bureau employees as also prohibiting rate bureau employees from making recommendations to member carriers; and (b) Whether the Interstate Commerce Commission correctly interpreted the explicit requirement in 49 U.S.C. § 10706(b)(3)(B)(v) that the name of a proponent of a rate proposal must be divulged also prohibits the docketing of rate proposals in the name of a member carrier committee?

PARTIES TO THE PROCEEDING

The following were original petitioners below and are petitioners here: National Motor Freight Traffic Association, Inc. and the National Classification Committee. The following were intervenors in opposition to petitioners below: Evans Food Products; Rudolph Foods, a Division of Beatrice Foods Co.; Rolet Food Products Company; The Porkie Co. of Wisconsin, Inc.; Famous Foods, Inc; Southern Snacks, Inc.; and Savory Foods, Inc.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals entered without opinion under Local Rule 13(c) of the District of Columbia Circuit is set forth in Appendix A, 1a–2a. The orders of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* appear in Appendix B, 3a–6a. The decision of the Interstate Commerce Commis-

sion under review in the Court of Appeals is unreported and appears in Appendix C, 7a–19a.

JURISDICTION

The judgment of the Court of Appeals was entered June 8, 1984. The orders of the Court of Appeals denying rehearing and rehearing *en banc* on the basis of a timely petition for rehearing and suggestion for rehearing *en banc* were entered on August 2, 1984. This Court has jurisdiction pursuant to 28 U.S.C. §§ 2350(a) and 1254(1).

RELEVANT STATUTES

The relevant statutes are the Interstate Commerce Act, 49 U.S.C. § 10706(b), and the Motor Carrier Act of 1980, Pub. L. 96–296 § 14(e), 94 Stat. 808. Section 10706(b) is set forth in its entirety in Appendix D, 20a–25a. The pertinent portion of Section 10706(b) of the Interstate Commerce Act and Section 14(e) of the Motor Carrier Act read as follows:

Section 10706. Rate Agreements: Exemption from Antitrust Laws

Section 10706(b):

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the

Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title [49 USCS § 10101(a)]. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12) [15 USCS § 12], do not apply to parties and other persons with respect to making or carrying out the agreement.

(3) Agreements submitted to the Commission under this subsection may be approved by the Commission only if each of the following conditions are met:

* * *

(B) Any organization established or continued under an agreement approved under this subsection must comply with the following requirements:

* * *

(iv) the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers;

(v) upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

Motor Carrier Act of 1980, Section 14(e), 94 Stat. 808:

> (e) Any organization established pursuant to an agreement approved by the Commission prior to the date of enactment of this Act under section 10706(b) of title 49, United States Code, may continue to function pursuant to such agreement until a new or amended agreement is finally disposed of by the Commission under section 10706 of title 49, United States Code, as amended by this section, so long as (1) such new or amended agreement is submitted to the Commission for approval within 120 days of such date of enactment, and (2) such organization complies with this section (including amendments made by this section and regulations issued under such amendments) during the period such new or amended agreement is being prepared, submitted to, and considered by the Commission.

STATEMENT OF THE CASE

Petitioner, National Motor Freight Traffic Association, Inc., is an organization of approximately 3,000 motor common carriers of property. Petitioner, National Classification Committee is a committee of 100 motor common carriers through which the member carriers of the National Motor Freight Traffic Association carry out the function of that organization, namely the establishment and maintenance of a nationwide system of uniform motor freight classifications of property. As provided in 49 U.S.C. § 10706(b)(2), the procedures under which the member carriers, acting through the National Classification Committee, undertake the "joint consideration, initiation and establishment" of the motor freight classification are spelled out in an agreement on file with the Interstate Commerce Commission (Commission). So long as the member carriers follow the pro-

cedures set forth in their agreement the "antitrust laws as defined in the first section of the Clayton Act do not apply" to the joint consideration, initiation and establishment of the motor freight classifications. See 49 U.S.C. § 10706(b)(2). On the other hand, if the agreement procedures are not followed, the antitrust laws do apply. In addition, in *Interstate Commerce Commission* v. *American Trucking Assn.*, ____ U.S. ____, 81 L.Ed.2d 282, 104 S.Ct. 2458 (1984), this Court recently held that the Commission has the remedial power to retroactively reject a tariff submitted in substantial violation of the agreement thereby exposing the carriers to potentially ruinous overcharge claims. 81 L.Ed.2d at p. 294.

In 1980, Congress undertook a comprehensive review of the procedures followed by motor carrier ratemaking organizations and wrote a very explicit statute setting forth new procedures to be followed by these organizations, commonly referred to as rate bureaus. Motor Carrier Act of 1980, P.L. 96–296, § 14, 94 Stat. 803, H. Rep. No. 96–1069, 96th Cong., 2d Sess., pp. 27–30. It also intended that the Commission be given clear directions for regulating motor carriers, P.L. 96–296, § 2, 94 Stat. 793, and the Act was passed in part " . . . to restrain the Commission from exercising too much discretion in dictating the terms of rate-bureau agreements." *American Trucking Assn., supra*, at 81 L.Ed.2d at p. 293, fn. 9. Congress required each organization to refile its agreement in compliance with the amendments made in the Motor Carrier Act, P.L. 96–296, § 14(e), 94 Stat. 808. The two specific rate bureau procedures involved in this case concern the prohibition against docketing and acting on classification proposals by rate bureau employees, 49 U.S.C. § 10706(b)(3)(B)(iv), and the requirement that the proponent of the proposal be identified, 49 U.S.C. § 10706(b)(3)(B)(v).

Petitioners filed their amended agreement on May 26, 1981, providing as pertinent: [1]

Article 1—Purpose and Scope

This agreement pertains to the joint consideration and handling of motor freight classification matters and for the organization, powers and procedures of a committee of one hundred representatives of the motor carriers party to this agreement to be known as The National Classification Committee and hereinafter called the Committee.

Article III—Authority and Procedure of the National Classification Committee

Section 1. Powers of the Committee

The Committee shall have the power to:

(a) Investigate, consider and make recommendations with respect to matters affecting the classification of commodities, and finally decide, fix and prescribe the context, provisions, regulations and ratings of the National Motor Freight Classification (hereinafter called the Classification); provided, however, that any carrier participating in such Classification shall have the right, at any time either before or after determination thereof, to publish, cause to be published, or to concur in any tariff or tariffs containing exceptions to said Classification and any or all provisions thereof;

Article IV—Rules For Changes in the National Motor Freight Classification

Rule 2. National Classification Board - Composition and Functions

The Board shall be composed of not less than three full-time employees, one of whom shall be the Chairman. It

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[1]The Commission has not acted on petitioners' agreement.

shall gather facts on, analyze and make recommendations on proposals for changes in the descriptions of articles, minimum weights, packaging requirements, ratings, rules or regulations in the Classification, hold public hearings, and submit its analysis and recommendations to the Committee, the Review Subcommittee and other appropriate Subcommittees.

Rule 3. Proposals

(a) All proposals for changes in the description of articles, minimum weights, packing requirements, ratings, rules or regulations in the Classification, shall be submitted in writing to the Committee. Proposals may be filed by any person, firm or corporation having an interest in the contents of the Classification, provided, however, that no employee of the Committee may docket a proposal affecting a change in the Classification. Upon request, the name of a proponent of a proposal docketed with the Committee, shall be divulged to any person.

(b) All persons (shippers, receivers, etc.) shall be permitted to present their views orally and/or in writing with respect to any proposal to establish or change a rate, classification, rating, rule, regulation, minimum weight, packaging requirement, or other tariff provision docketed before the Committee. They may so participate individually or collectively through membership in leagues, associations, institutes, organizations or other groups. Such persons may at the same time participate individually in these same matters.

After the amended agreement was on file with the Commission, petitioners processed a change in the motor freight classification applicable to a snack food referred to as pork skins and bacon rinds which the Commission has ordered cancelled. The professional staff of the rate bureau (referred

to in the agreement as the National Classification Board), prepared an analysis and recommendation regarding a change in the classification applicable to pork skins and bacon rinds as provided in the agreement, Article IV, Rule 2, *supra*, pp. 6–7.

The analysis and recommendation were submitted to the National Classification Committee which reviewed the analysis and recommendation of the staff and voted to docket a proposal that would change the classification as provided in Articles I and III of the agreement, *supra*, p. 6. After notice of the proposed change was given to the public, the professional staff held a hearing as provided in Article IV, Rule 2, *supra*, pp. 6–7 and submitted an analysis and recommendation to the National Classification Committee based on the facts developed at the hearing. The carrier members of the National Classification Committee ultimately voted by mail to approve the proposed change and submitted the tariff item for filing with the Commission. As provided in Article IV, Rule 3, *supra*, p. 7, upon request, the names of the carrier members of the National Classification Committee who voted to docket the proposal would have been provided to any person requesting that information.

Before the tariff item incorporating the proposed change became effective, the Commission suspended the tariff and conducted an investigation as provided in 49 U.S.C. § 10708. In its final decision, Appendix C, the Commission ordered the tariff item cancelled for the future.[2] The Com-

[2]The Commission subsequently ordered cancellation of some 400 other classification tariff items processed under substantially the same procedures followed with respect to the change in the classification applicable to pork skins and bacon rinds. Petitioners have sought review of that order in No. 84–1195, *National Classification Committee and National Motor Freight Traffic Association, Inc.* v. *United States of America and Interstate Commerce Commission*, pending in the United States Court of Appeals for the District of Columbia Circuit.

mission found that the procedures followed by petitioners, namely a recommendation by the bureau employees, the docketing by the National Classification Committee and the holding of a hearing by the bureau employees violated the procedures required by 49 U.S.C. § 10706(b)(3)(B)(iv) and (v). Appendix C, 12a–19a. The Commission did not find that the procedures followed by petitioners did not conform to the procedures called for in their agreement nor did the Commission find that the procedures set forth in the agreement did not conform to the amendments required by Congress. Appendix C, p. 10a.

Petitioners sought review of the Commission decision in the United States Court of Appeals for the District of Columbia. The lower Court affirmed the Commission without opinion. Appendix A. Petitioners now seek issuance of a writ of certiorari because of the special and important issues raised by the Commission decision as affirmed by the Court of Appeals.

REASON FOR GRANTING THE WRIT

I. The Commission Decision Creates A Conflict of Law

In the *American Trucking Assn.* case, *supra*, this Court recently stated that:

> Section 14 of the MCA [Motor Carrier Act of 1980] established specific guidelines, to which rate-bureau agreements must conform if they are to receive antitrust immunity [footnote omitted]. Because the MCA creates a presumption that bureau agreements meeting the requirement of § 14 will qualify for antitrust immunity, the Act divests the Commission of much of its discretion to approve and disapprove rate bureau agreements. See H. Rep. No. 96–1069, p. 29 (1980). ___ U.S. ___, 81 L.Ed.2d at 286 (1984).

In interpreting 49 U.S.C. § 10706(b)(3)(B)(iv), the Commission has found the prohibition against rate bureau employee docketing and acting on proposals to embrace a prohibition against recommendations being made by rate bureau employees. This interpretation is clearly beyond the express language used in the statute. Moreover, the interpretation is contrary to the legislative history of the statute. The Motor Carrier Act of 1980 was originally introduced in the Senate. In acting on S.2245, the Senate Committee on Commerce, Science and Transportation specifically rejected statutory language that would have prohibited bureau employees from making specific recommendations with regard to tariff items stating:

> During the markup, the Committee eliminated some of the rate bureau sections and replaced one important part with another provision. In particular, the Committee eliminated a strict prohibition against employees of rate bureaus making recommendations with regard to changes in tariff items. The Committee strongly believes that rate bureau employees should play less of a part in determining carrier rates than the carriers themselves. Nevertheless, it is clear that these individuals have a good deal of expertise and that their recommendations are valuable to the member carriers. Accordingly, that specific prohibition has been eliminated. Sen. Rep. 96–641, 96th Cong. 2d Sess. at p. 14.

The same view is expressed in the House Report. In H. Rep. No. 96–1069, 96th Cong., 2d Sess. p. 27, the House Committee on Public Works and Transportation states:

> Many of those rate bureaus are staffed by skilled experts with technical expertise to process rate applications and to make recommendations and proposals to

> the members of the bureau for changes in basic rate structures.

Clearly, when Congress evinces its intent to restrain the Commission discretion on the conditions the Commission can impose in rate bureau agreements, the Commission cannot avoid that restraint by finding as it has done here that the employee recommendations violate 49 U.S.C. § 10706(b)(3)(B)(v) while at the same time not finding that employee recommendations do not violate the carrier agreement and that the agreement does not violate the statute.

The same is true with respect to the statutory requirement that rate bureaus divulge the name of carrier proponents upon request. The Commission has interpreted this language as condemning the procedure whereby petitioners jointly initiate a proposal in the name of the National Classification Committee and then divulge the names of the carriers that voted for and against the docketing. Again the Commission has not found that the procedure violates the carrier agreement or that the agreement violates the Act. In short, the Commission has found that it has the discretion to eliminate the right of carriers to jointly initiate a proposal contrary to the plain meaning of the statutes and Congressional intent.

Nothing in the Motor Carrier Act of 1980 changed the authorization of the National Classification Committee to jointly initiate a classification change. Both before and after passage of that Act, the statute provided for "joint . . . initiation" of classifications, 49 U.S.C. § 10706(b)(2). The legislative history again makes this point clear with the House Report stating: "The bill allows the rate bureaus to continue, subject the provisions of this Section [Section 14] their functions with respect to . . . proposing changes in commodity classifications. . . ." H. Rep. No. 96–1069, 96th

Cong., 2d Sess., p. 28. The change required by Section 14 was that the proponent be identified and not that a carrier committee be denied the right to docket a proposal. Petitioners meet the identification of the proponent requirement by revealing the names of the carriers voting to docket the proposal.

These erroneous interpretations of statutory authority place petitioners in an untenable position. In *American Trucking Assns., supra*, this Court held that the Commission has the power to retroactively reject a tariff that was filed in substantial violation of a bureau agreement. ___ U.S. ___, 81 L.Ed.2d at 294. The Court noted this threat will provide strong incentives for member carriers to abide by the terms of their agreement and that member carriers will also strive to follow the specific Section 14 guidelines in order to avoid antitrust problems. ___ U.S. ___, 81 L.Ed.2d at p. 293. In *Board of Trade of City of Chicago* v. *I.C.C.*, 646 F.2d 1187 (1981), the Court of Appeals for the Seventh Circuit found that the Commission cannot excuse carrier failure to comply with the agreement.[3]

The law announced in the *American Trucking Assn.* case and the *Board of Trade* case and the affirmance of the Commission decision in this case by the D.C. Circuit creates a conflict of law akin to a conflict in circuits mentioned in Rule 17.1(a) of the Supreme Court's rules. If petitioners do not follow their agreement, they can be exposed to the severe consequences outlined in *American Trucking Assn.* case with the *Board of Trade* case establishing that the Commission cannot excuse the carriers' failure to follow the procedures in the agreement. If petitioners strictly observe the procedures in their agreement, as they did in this case,

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[3]Carriers involved in the *Board of Trade* case were subsequently sued under the antitrust laws.

the tariff item is cancelled by order of the Commission as affirmed by the D.C. Circuit.

II. Petitioners Need Legal Certitude

The dilemma faced by petitioners has national significance. All of the major motor common carriers of general freight are parties to the national classification tariff. Because of the threat of retroactive cancellation of a tariff resulting in potential overcharge claims and exposure to the antitrust laws that provide for criminal prosecution as well as civil injunctive relief, petitioners need legal certitude. The 3,000 member carriers of the agreement should not be subject to collateral attack by a Commission finding that the procedures followed with respect to a particular tariff item violate 49 U.S.C. § 10706(b)(3)(B)(iv) and (v) when there is no finding that the procedures did not conform to their agreement, and no finding that the agreement does not conform to the Act. Nor should the member carriers be exposed to litigation under the antitrust laws that may grow out of a Commission finding that a collectively made tariff item does not meet the requirements of 49 U.S.C. § 10706(b)(3)(B)(iv) and (v).

Petitioners maintain that the statutory scheme was designed to provide the motor carrier industry with certitude so that they can act within the law when they engage in collective activity under their agreement that would otherwise be unlawful. In *American Trucking Assn.*, ____ U.S. ____, 81 L.Ed.2d at 294, this Court stated: "[T]he guidelines for antitrust immunity set out in section 14 [49 U.S.C. 10706 (b)] of the MCA are of such a nature that carriers who submit tariffs in substantial violation of agreements will be aware of their transgressions." The Commission decision, as affirmed by the Court of Appeals has deprived petitioners of the ability to be aware of their trans-

gressions. Here, petitioners adhered to the terms of their agreement and the explicit language in 49 U.S.C. §§ 10706(b)(3)(B)(iv) and (v). Yet, petitioners are still found to have violated the law because the Commission has interpreted the law in such an arbitrary manner that a prohibition against employee docketing comes to mean a prohibition against employee recommendations and a requirement that the name of a carrier proponent be divulged comes to mean that a proposal cannot be docketed in the name of a carrier committee even though the names of the carriers who voted for and against the proposal are divulged. Petitioners, therefore, urge that this Court resolve the carriers' dilemma and provide the motor carrier industry with the certainty needed by finding that the Commission interpretations of the very specific procedural requirements in 49 U.S.C. §§ 10706(b)(3)(B)(iv) and (v) are erroneous, and that the Commission has no statutory authority to order a collectively made tariff cancelled when the tariff was processed under the terms of their agreement and there is no finding that the agreement does not conform to the procedures required by Congress.

Conclusion

For the foregoing reasons, Petitioners urge that a Writ of Certiorari be issued by this Court and that this case be set for plenary review.

Respectfully submitted.

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October 1984

**Counsel of Record*

Appendix A

Not to be Published - See Local Rule 8 (f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

SEPTEMBER TERM, 1983

No. 83–1866

NATIONAL CLASSIFICATION COMMITTEE AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

EVANS FOOD PRODUCTS *et al.*,

Intervenor

FILED
United States Court of Appeals
For the District of Columbia Circuit
June 8, 1984
GEORGE A. FISHER
Clerk

Petition for Review of an Order of the Interstate Commerce Commission

Before: Wright, Tamm, and Starr, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commission and was briefed and argued by counsel. The court has fully considered the issues presented; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

This court is in agreement with the result reached by the Commission, generally for the reasons stated in its Decision dated July 20, 1983 (*see* Joint Appendix at 334a-342a).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed. It is

FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1866

NATIONAL CLASSIFICATION COMMITTEE AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents,

EVANS FOOD PRODUCTS, *et al.*,

Intervenors.

FILED
United States Court of Appeals
For the District of Columbia Circuit
August 2, 1984
GEORGE A. FISHER
Clerk

BEFORE: Wright, Tamm and Starr, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Petitioners, filed July 20, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1866

NATIONAL CLASSIFICATION COMMITTEE AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents,

EVANS FOOD PRODUCTS, *et al.*,
Intervenors.

FILED
United States Court of Appeals
For the District of Columbia Circuit
August 2, 1984
GEORGE A. FISHER
Clerk

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of Petitioners has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

Appendix C

INTERSTATE COMMERCE COMMISSION

DECISION

Investigation and Suspension
Docket No. M-30360

RECLASSIFICATION OF PORK SKINS AND BACON RINDS, NMFC, AUGUST 1982

Decided: July 20, 1983

SUMMARY

We are ordering cancellation of a reclassification of pork skins and bacon rinds.[1] A National Classification Committee (NCC) proposal to reclassify these commodities was suspended on the grounds that the NCC's procedures appeared to violate the statutory requirements of 49 U.S.C. 10706(b)(3)(B)(iv) and (v). These provisions, enacted as part of the Motor Carrier Act of 1980 (MCA), prohibit rate bureau employees from docketing or acting upon proposals, require disclosure of a proponent's identity, and mandate open meetings and voting on proposals.

We find that the docketing of the pork skins proposal in the name of the NCC, the making of a recommendation on the proposal by NCC's employees, and the use of a mail voting procedure by NCC violated these provisions and the implementing requirements of Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, 364 I.C.C. 464 (1980), *aff'd in part, American Trucking Associa-*

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[1]The respondents were granted several extensions of time in which to file their opening statement of facts and argument, after offering to voluntarily suspend the effectiveness for any additional time granted. The effective date was postponed to June 11, 1983.

tions, Inc. v. ICC, 688 F.2d 1337 (11th Cir. 1982)[2] although mail voting in itself would have been acceptable under other circumstances. Furthermore, we find that the holding of a hearing by rate bureau employees violates the intent of 49 U.S.C. 10706(b)(3)(B)(iv) that employees not "act upon" any reclassification proposal. Since the tariff filing incorporates a proposal that was developed by improper rate bureau procedures, we find it unlawful and order that it be canceled.

BACKGROUND

Through Item 74400–A, published in Supplement 5 to the National Motor Freight Classification, ICC-NMF-100-I, and originally scheduled to become effective on August 14, 1982, the NCC proposed to cancel Item 74400 so that those articles falling within the commodity description "Fried Bacon or Pork Rinds or Skins" would be classified under Item 72400, which includes snack food items such as "Chips, Puffs, Sticks or Twists." The reclassification could result in the application of higher freight rates on shipments of pork skins and bacon rinds.

Upon joint protest by certain producers of these commodities[3] the proposed tariff item was suspended and an investigation was ordered. The Suspension board found that, in its opinion, the proposal violated the employee docketing provision of 49 U.S.C. 10706(b)(3)(iv) and the Commission's interpretation of that section, see Ex Parte No. 297 (Sub-No. 5) *supra*, 364 I.C.C. 478–1, and also appeared to violate the open

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[2]Six portions of the Commission's rules (but not our analysis of employee docketing) were challenged in the court of appeals. With the exception of the portions of the rules dealing with blanket special permission authority and the rejection of effective tariffs the rules were upheld. The Supreme Court has granted our petition for a writ of certiorari on the rejection issue, *ICC v. American Trucking Associations*, S. Ct. No. 82–1643, certiorari granted June 20, 1983.

[3]Evans Foods Products, Rudolph Foods, A Division of Beatrice Foods Co., Rolet Food Products Company, The Porkie Co., of Wisconsin, Inc., Famous Foods, Inc., Southern Snack, Inc., and Savory Foods, Inc. (protestants).

meeting requirement of 49 U.S.C. 10706(b)(3)(v), see 364 I.C.C. 481–3.

The modified procedure has been followed. Evidence in support of the proposal was presented by respondents. Protestants filed evidence in opposition, to which respondents replied.[4]

Under 49 U.S.C. 10706, regulated motor common carriers of property may enter into agreements concerning rates, allowances, classification, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. The approval of these agreements accords the signatory carrier members relief from operation of the antitrust laws with respect to the making and carrying out of the terms of the approved agreement. Because the carrier members are generally competitors in the marketplace, their collective action on prices could constitute an antitrust violation without the immunity.

Rate bureaus are legal entities that the carriers establish to engage in joint or collective action. One such rate bureau is the National Motor Freight Traffic Association (NMFTA). The NCC is composed of 100 elected motor carrier representatives of the NMFTA membership, and is an autonomous standing committee of the NMFTA. The NCC is the organization through which the respondents, about 3,000 motor common carriers, collectively establish classifications[5] of commodities in the National Motor Freight Classification.

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[4]In a decision served March 4, 1983, it was determined that the scope of the investigation is limited to rate bureau practices and that the reasonableness of the underlying reclassification is not in question.

[5]Classifications are groupings of commodities of similar composition and other characteristics (e.g., density, packaging, value, etc.). Commodities assigned to a particular category often bear the same freight rate. Thus, decisions concerning the proper classification of a commodity are often tantamount to decisions concerning the freight rate to be charged for transportation of the commodity. For a more complete explanation, See Ex Parte No. MC–98 (Sub-No. 1), *Investigation into Motor Carrier Classification* (not printed), served March 9, 1983.

The MCA[6] made a number of procedural reforms in the rate bureau process, establishing new requirements and standards as a condition to continued antitrust immunity. The MCA provided that motor carrier rate bureaus may continue to function under their previously granted immunity provided they: (1) submit new or amended agreements to the Commission for approval within 120 days of enactment of the statute; and (2) observe the requirements and standards of the act as well as any implementing regulations during the time amended agreements are being prepared, submitted, and considered by the Commission.[7]

In Ex Parte No. 297 (Sub-No. 5) *Motor Carrier Rate Bureaus - Imp. P.L. 96–296*, 364 I.C.C. 464 (1980), we adopted rules and regulations to facilitate compliance with the statutory changes. NCC filed an amended agreement on May 26, 1981, designed to comply with the implementing standards of Ex Parte No. 297 (Sub-No. 5). This amended agreement is now pending before the Commission.[8]

Consequently, we will not consider protestants' allegations that the actions of the NCC violate the amended agreement, and the scope of this proceeding is limited to the allegations of violations of section 10706 and our regulations.

FACTS

The proposed reclassification of pork skins was initiated in the name of NCC itself, not in the name of any specific proponent carrier. Two letters obtained by protestants in the course of this proceeding show that Pacific Intermountain Express (PIE), a motor carrier, asked the NCB to conduct a research project on pork rinds, and inquired whether some changes in the classification were possible. Because NCB received those

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[6]Pub. L. No. 96–296, 94 Stat. 793.

[7]Section 14(e) of the MCA.

[8]Section 5a Application No. 61, *National Motor Freight Classification Agreement*.

letters over two years before the presently disputed pork rind proposal was docketed, and because the letters do not actually propose any particular change, we agree with respondents' firmly expressed view that PIE was not the proponent of this classification change.

The evidence indicates that the proposal was originally docketed by the NCC on January 19, 1982. The Docket Bulletin (No. 821) provided that a public hearing would be held before the National Classification Board (NCB), a group of full-time employees of the NCC. NCC states that, as a general matter, the function of NCB is to gather facts, analyze, and make recommendations on proposals for classification changes. When a proposal is made by a carrier or shipper, NCB reviews it for technical correctness, enters it on the first available docket, conducts hearings, or gathers written information, and submits its analysis to the NCC subcommittee.

Respondents also indicate that NCB is charged with a continuing duty "in response to problem areas identified by participating carriers and shippers," to research the appropriateness of classifications on identified articles. If NCB finds an inconsistency, it submits a summary to the National Classification Review Subcommittee (NCRC), indicating what change would be appropriate. The NCRC determines by vote (presumably a mail vote) whether a proposal is to be docketed (presumably in the name of NCC).

The protestants requested time to present testimony and the NCB held a hearing on February 26, 1982.

On May 11, 1982, the NCC issued a Notice of Disposition approving the proposal as docketed. Respondents' evidence indicates that the NCRC was the organization that actually voted on whether to docket the reclassification and again on whether to aprove it. Both votes apparently were conducted by mail. The evidence indicates that NCC rarely, if ever, conducts actual meetings for such purposes. NCC states that a tally of each vote was available to interested parties upon request.

The Notice of Disposition was not appealed.[9] Therefore, it became the final action of the NCC.

Protestants contend that NCC followed improper procedure in both the docketing and the disposition of the pork skins reclassification. For clarity, we will discuss the two matters separately.

DOCKETING

We conclude that the docketing of the pork skins proposal in the name of NCC violated both a ban on docketing by rate bureau employees and a requirement for disclosure of a proponent's identity.

The employee docketing ban is found at 49 U.S.C. 10706(b)(3)(B)(iv), which provides as follows:

> [T]he organization may not permit one of its own employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers[.]

This is aimed at eliminating procedures such as those formerly practiced by NCB in docketing proposals in its own name. The NCC submits that the current functions of the classification board are in accordance with present law in that NCB provides staff expertise to the NCC and its subcommittees, but does not docket proposals. The actual docketing is in the name of NCC, which is composed of member carriers, not employees. On the other hand, protestants allege that the docketing proposal submitted to NCC concerning reclassification of pork skins contained no informative material as to the relative merits of the proposal.

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[9]The NCC's rules of procedure permit only member carriers and shippers actually making an initial proposal to appeal the disposition to the NCC. Protestants, of course, were not the proponents of the reclassification.

In our view, the NCC's current procedure is inconsistent with the employee docketing ban. Following PIE's suggestion of a possible reclassification, the NCB, on its own initiative, formed and developed a reclassification proposal on pork skins and bacon rinds. The MCA intended that carriers or shippers, not rate bureau employees, initiate classification proposals. It was improper for the NCB to propose reclassification of pork skins and bacon rinds on its own initiative. The fact that the NCRC formally approved the docketing fails to override the fact that the NCB actually originated the proposal.

Moreover, regardless of NCB's role in the matter, we hold that docketing of the proposal in the name of NCC was improper. The employee docketing ban is only part of a larger congressional effort to assure that responsibility for changes in rates and classification is assumed by the carriers themselves.[10] Another provision suggests Congress intended that carrier responsibility be exercised, not by committees, but by specific, identifiable carriers. In 49 U.S.C. 10706(b)(3)(B)(v), Congress provided that, "upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it. . . ." This requirement would be rendered meaningless if the NCC were permitted to docket proposals in its own name and thereby conceal the identity of the specific carrier or carriers seeking the classification change.[11]

While the question of docketing by a carrier committee did not receive explicit attention in Ex Parte No. 297 (Sub-No. 5), the Commission's discussion of other points clearly implies that docketed proposals must be the responsibility of identifiable

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[10]*See* Ex Parte No. 297 (Sub-No. 5), *supra*, at 479.

[11]Significantly, the evidence indicates that 144 proposals have been initiated by the NCC since May 1981, but that only 20 have been initiated by carriers since that date. This suggests that NCC is capable of concealing the identity of a carrier proponent in contravention of the statutory mandate to disclose the identity of proponents.

carriers. The Commission stated that "employee advice shall be available only as a resource to the *carrier(s) which actually initiates the tariff proposals* (emphasis supplied).[12] Similarly, "[e]mployees and employee committees may provide expert analysis and technical assistance to *a member carrier* in developing or evaluating a *carrier initiated* rate or rule proposal (emphasis supplied).[13] Respondents argue that NCC docketing is authorized under 49 U.S.C. 10706(b)(2), which provides for agreements concerning rates and classification and "procedures for joint consideration, initiation, or establishment of them." They note that docketing in the name of NCC is a form of joint initiation of a classification. The quoted language, however, does not provide unconditional authority for collective action. Rather, it is expressly subject to the conditions imposed in section 10706(b)(3).

In reforming motor carrier rate bureau procedures, Congress intended to lift the veil of secrecy that has obscured ratemaking for over 30 years. It sought, among other things, to place the open responsibility for rate and classification changes on individual carriers. The actions of the NCC as the nominal initiator of a majority of classification changes obstruct this goal. By proposing classification changes as a group, NCC members take only collective responsibility for the changes and thereby avoid the competitive consequences of individual carrier responsibility. This is directly contrary to congressional intent. Thus, even though the NCC is composed of member carriers, it may not docket proposals in its own name. Only the actual proponent carrier may properly request consideration of a change in the tariff.

Since the docketing of the pork skins reclassification by the NCC was inconsistent with the employee docketing ban in 49 U.S.C. 10706(b)(3)(B)(iv) and with the requirement of 49 U.S.C. 10706 (b)(3)(B)(v) for disclosure of a proponent's identi-

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[12]Ex Parte No. 297 (Sub-No. 5), *supra*, at 480.

[13]*Id.* at 481.

ty, the tariff filing that incorporates this reclassification is unlawful.

DISPOSITION OF THE DOCKETED PROPOSAL

It is apparent that the NCB, employees of the NCC, not only initiated but also held a hearing on and then recommended adoption of the pork rinds proposal. Indeed, it appears that the NCC's docketing of the pork skins proposal occurred on a mail vote in response to a recommendation by NCB. The NCC's approval of the proposal occurred on a second mail vote in response to an NCB recommendation following the hearing. Protestants challenge this procedure as relegating the NCC to the role of a "rubber stamp" for changes in classifications sought by the NCB.

Although the NCC agreement provides[14] specifically that NCB may submit recommendations on proposals, this provision has not been approved by the Commission. Until the Commission completes its review of the NCC agreement, NCC must comply with the applicable law and regulations in order for its actions to receive our approval.[15]

The propriety of recommendations by rate bureau employees is an issue raised by the provisions of 49 U.S.C. 10706(b)(3)(B)(iv) that employees may not "act upon" any proposal. In Ex Parte No. 297 (Sub-No. 5), the Commission decided that the role of rate bureau employees should be confined to providing expert analysis of docketed proposals and technical assistance. A sample amendment to existing agreements set forth in that decision does not include authorization to submit recommendations.[16] The recent decision in *Bus Rate Bureau Procedures*, 367 I.C.C. 313 (1983) confirms that our intent was to preclude staff recommendations. There, we largely applied the Ex Parte No. 297 (Sub-No. 5) standards to the bus indus-

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[14]Article IV, Rule 2.

[15]MCA, *supra*, section 14(e).

[16]Ex Parte No. 297 (Sub-No. 5), *supra*, at 479–481.

try, and, discussing analysis by rate bureau employees, we stated that "these analyses should contain nothing that can be construed as a recommendation . . ."[17]

Insofar as the NCC itself is concerned, Appellate Division 2 pointed out problems stemming from the apparent failure of NCC to act independently of the NCB. In I.&S. Docket No. M–30294, *Classification of Can and Containers, Nationwide* (not printed), served March 16, 1982, at p. 5, the Division stated:

> One final matter requires some comment. The Review Board found that NCC's handling of these proposals did not violate the rate bureau provisions of the Motor Carrier Act of 1980 or Ex Parte No. 297 (Sub-No 5) * * * *. In view of our conclusions on the other issues, we need not decide whether NCC's actions were unlawful. Nevertheless, we are concerned that its "rubber-stamp" approach to the recommendations of its employee board on these proposals undoubtedly violated the spirit, if not the letter, of both the Motor Carrier Act and our rate bureau proceeding. In the future, the NCC should carefully take all reasonable and necessary steps to comply. We will monitor the situation, as classification matters tend to have greater impact than other rate and rate-related actions.

It is undisputed that NCC's approval of the pork skins proposal was based on a recommendation by NCB. There is nothing to indicate that NCRC or NCC exercised any independent judgment on the proposal. Thus, there is every reason to conclude that the organization is allowing its employees to wield essentially unfettered discretion. The inconsistency of this procedure with the requirements of Ex Parte No. 297 (Sub-No. 5) is another factor, in addition to docketing by NCC, that renders the tariff incorporating the proposal unlawful.

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[17]367 I.C.C. at 313 (1983).

Similarly, we conclude that NCB's conducting of a hearing on the proposed rate classification is contrary to the intent of 49 U.S.C. 10706(b)(3)(B)(iv) to limit the participation of rate bureau employees in reclassifications. See H.R. Rept. No. 96–1069, 96th Cong. 2d Sess. 27, 30 (1980); S. Rept. No. 96-641, 96th Cong. 2d Sess. 14 (1980). See also Ex Parte No. 297 (Sub-No. 5), *supra*, 364 I.C.C. at 479–481. If rate bureau employees should not initiate or submit rate proposals nor make final determinations to dispose of them, it follows that employees also should not be the ones to take testimony and hear evidence on the merits of proposals. Doing so conflicts with the prohibition on "act[ing] upon" proposals in the statute and is far removed from permissible employee action—giving technical advice and helping the proponent of a rate change to docket it in proper form. For rate bureau employees to conduct hearings on proposed actions substantially lessens the likelihood that the carriers themselves will gather information, analyze and discuss the merits of proposals. This is contrary to the spirit of the statutory prohibition of employee docketing, because, as the rate bureaus themselves conceded in Ex Parte No. 297 (Sub-No. 5), 364 I.C.C. at 480, the rule against employee docketing was designed to assure that carriers propose their own rates and make their own decisions.

Protestants contend that the use of the mail voting procedure deprived them of their statutory right to be present at any meeting at which rates or rules are discussed or voted upon. Section 10706(b)(3)(B)(v) provides:

> [U]pon request, the organization . . . must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

In Ex Parte No. 297 (Sub-No. 5), we stated that this requirement allows for adequate monitoring to foster the competitive goals of the act and provides reasonable safeguards against potentially illegal activity. Although we observed that mail

voting could be interpreted as contrary to the open meeting requirement, we did not prohibit its use. Instead, we cautioned the rate bureau against using this procedure to circumvent restrictions on open voting or discussion of certain matters.

Protestants argue that the public has an interest in how the merits of the proposals are discussed by the NCC members and that this right is circumvented when proposals are initiated and disposed of without any on-the-record discussion or consideration. NCC contends that the use of mail voting is absolutely essential to the conduct of its business, since handling the large number of proposals would create a tremendous cost to NCRC members if public meetings were regularly held.

It appears that NCC complied with the rule that the votes of committee members be disclosed upon the request of any person. Nevertheless, disclosure of the voting record, by itself, fails to cure the infirmities in NCC's use of mail voting on the proposal. The disclosure of votes is specifically required by a separate subpart of section 10706, which indicates that Congress viewed this as a distinct requisite for approval. When used in conjunction with the NCC's current procedures, mail voting enhances the influence of the bureau employees and encourages a passive (i.e., "rubber stamp") role by committee members. For that reason, we conclude that mail voting on the pork skin reclassification proposal was an integral part of an overall procedure that violated the principle of specific carrier responsibility for tariff proposals. Had mail voting occurred in conjunction with a proposal that was docketed and supported by a specific carrier and not tainted by recommendation by NCB, it would not ordinarily conflict with the views expressed in Ex Parte No. 297 (Sub-No. 5) in the absence of other impermissible actions.

Finally, protestants argue that the NCC agreement is flawed because it does not provide shippers with appellate rights. As discussed above, we are equally concerned, but need not resolve the matter here. We will address it in our review of

Application No. 61. Consequently, the matter will not be further considered in this decision.

FINDINGS AND ORDER

In Ex Parte No. 297 (Sub-No. 5), we stated that we would reject tariffs when they were shown to have been adopted or published under procedures that violated rate bureau agreements.[18] As we have the power to disapprove a tariff for these violations, we also have the power to require cancellation of a tariff developed under procedures that violate the statute. In this proceeding, we find that the procedures used by the NCC to reclassify pork skins and bacon rinds violate the statutory provisions of 49 U.S.C. 10706(b)(3)(B)(iv) and (v), and our regulations. Accordingly, we shall order the NCC to cancel the suspended tariff filing.

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Respondents shall cancel the schedules described in this decision on or before 35 days from the date of service of this decision, upon not less than one-day's notice to this Commission and to the general public by filing and posting in the manner prescribed by statute and Commission regulations.

2. This proceeding is discontinued.

3. This proceeding is now administratively final within the meaning of 49 C.F.R. 1115.3.

4. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice-Chairman Sterrett, Commissioners Andre and Gradison. Chairman Taylor concurred. He would have rejected the tariff.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

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[18] 364 I.C.C. at 499–500.

Appendix D

49 U.S.C. § 10706:

(b) (1) In this subsection, "single-line rate" refers to a rate, charge, or allowance proposed by a single motor common carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 *et seq.*] may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title [49 USCS § 10101(a)]. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12) [15 USCS § 12], do not apply to parties and other persons with respect to making or carrying out the agreement.

(3) Agreements submitted to the Commission under this subsection may be approved by the Commission only if each of the following conditions are met:

(A) Each carrier which is a party to an agreement must file with the Commission a verified statement that specifies its name, mailing address, and telephone number of its main office; the names of each of its affiliates; the names, addresses, and affiliates of each of its officers and directors; the names, addresses, and affiliates of each person, together with an affiliate, owning or controlling any debt, equity, or security interest in it have a value of at least $1,000,000. In this subparagraph, "affiliate" means a person controlling, controlled by, or under common control or ownership with another person and "ownership" means equity holdings in a business entity of at least 5 percent.

(B) Any organization established or continued under an agreement approved under this subsection must comply with the following requirements:

(i) subject to the provisions of subparagraphs (C), (D), (E), and (F) of this paragraph, (I) the organization may allow any member carrier to discuss any rate proposal docketed, but (II) after January 1, 1981, only those carriers with authority to participate in the transportation to which the rate proposal applies may vote upon such rate proposal;

(ii) the organization may not interfere with each carrier's right of independent action and may not change or cancel any rate established by independent action after the date of enactment of this subsection [enacted July 1, 1980], other than a general increase or broad rate restructuring, except that changes in such rates may be effected, with the consent of the carrier or carriers that initiated the independent action, for the purpose of tariff simplification, removal of discrimination, or elimination of obsolete items;

(iii) the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier;

(iv) the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers;

(v) upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

(vi) the organization may not allow a carrier to vote for one or more other carriers without specific written authority from the carrier being represented; and

(vii) the organization shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed, except that if unusual circumstances require, the organization may extend such period, subject to review by the Commission.

(C) No agreement approved under this subsection may provide for discussion of or voting on rates to which the provisions of section 10708(d) or 10730(b) of this title [49 USCS §§ 10708(d) or 10730(b)] apply, except that rates established or filed under section 10730 of this title [49 USCS § 10730] before the date of enactment of the Motor Carrier Act of 1980 [enacted July 1, 1980] or changes with respect to such rates may be discussed or voted on under agreements approved under this subsection until January 1, 1984.

(D) No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under sec-

tion 14(b)(4) of the Motor Carrier Act of 1980 [note to this section] on or before January 1, 1983. This subparagraph shall not apply to any single-line rate proposed by a motor common carrier of passengers. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) general rate increases or decreases if the agreement gives shippers, under specified procedures, at least 15 days' notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission and if discussion of such increases or decreases is limited to industry average carrier costs and, after the date of elimination of the antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(ii) changes in commodity classifications;

(iii) changes in tariff structures if discussion of such changes is limited to industry average carrier costs and, after the date of elimination of antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(iv) publishing of tariffs, filing of independent actions for individual member carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

(E) On and after January 1, 1983, no agreement approved under this subsection may provide for discussion of or voting upon any single-line rate proposed by a motor common carrier of passengers. On and after January 1, 1984, no agreement approved under this subsection may provide for discussion of or voting upon any joint rate proposed by one or more motor common car-

riers of passengers. This subparagraph shall not apply to any rate applicable to special or charter transportation. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) any general rate increase or decrease, broad change in tariff structure, or promotional or innovative fare change, as defined by the Commission and subject to such notice requirements as the Commission may specify by regulation, if discussion of such general increase or decrease is limited to industry average carrier costs and intermodal competitive factors and does not include discussion of individual markets or particular single-line rates or joint rates; and

(ii) publishing of tariffs, filing of independent actions for individual member carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

(F) After the effective date of this subparagraph, no agreement approved under this subsection may provide for discussion of or voting upon any rate applicable to special or charter transportation proposed by a motor common carrier of passengers. This subparagraph shall not apply to publication of any such rate.

(G) In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(H) The Commission shall, by regulation, determine reasonable quorum standards to be applied for meetings of organizations established or continued under an agreement approved under this subsection.

(4) Notwithstanding any other provision of this subtitle, before the date on which the antitrust immunity is eliminated for discussion of or voting on single-line rates by paragraph (3)(D) of this subsection, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of property from discussion or voting under agreements authorized by this subsection on matters concerning rates, allowances, classifications, or divisions, except that before such date, the Commission may issue regulations which take effect on or after such date to carry out the provisions of such paragraph.

(5) Notwithstanding any other provision of this subtitle [49 USCS §§ 10701 et seq.] (other than paragraph (3)(F) of this subsection, relating to special and charter transportation of passengers), before January 1, 1983, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of passengers from discussion or voting under agreements authorized by this subsection on matters concerning rates, allowances, or divisions, except that before January 1, 1983, the Commission may issue regulations which take effect on or after January 1, 1983, to carry out the provisions of paragraph (3)(E) of this subsection.

No. 84-699

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND NATIONAL CLASSIFICATION COMMITTEE, PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission may order a tariff cancelled where it was formulated under procedures, specified in an unapproved ratemaking agreement, that violate the Motor Carrier Act of 1980.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) and the decision of the Interstate Commerce Commission (Pet. App. 7a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on June 8, 1984. A petition for rehearing was denied on August 2, 1984 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Motor carriers subject to regulation by the Interstate Commerce Commission (ICC or Commission) are authorized by Congress to enter into rate agreements with other carriers. See Reed-Bulwinkle Act of 1948, as amended, 49 U.S.C. 10706(b). The carriers have established rate bureaus to facilitate the negotiation of collective rates and to act as their agents in submitting tariffs to the Commission. Carriers participating in a rate bureau enjoy antitrust immunity for their collective ratemaking activities so long as the bureau's agreement describing the manner in which it will negotiate collective tariffs has been approved by the Commission and the carriers' actions conform to that agreement. See *ICC* v. *American Trucking Ass'ns, Inc. (ATA)*, No. 82-1643 (June 5, 1984), slip op. 1-2.

In Section 14 of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 803 (MCA), Congress set forth specific requirements that rate bureau agreements must satisfy if they are to be approved by the Commission (49 U.S.C. 10706(b)(3)). These requirements reflect Congress's intent "to lift the veil of secrecy that ha[d] obscured ratemaking for over 30 years" (Pet. App. 14a). Congress was concerned that the rate bureau process was "controlled largely by rate bureau employees rather than the carriers." H.R. Rep. 96-1069, 96th Cong., 2d Sess. 27 (1980) (House Report). Although it did not eliminate rate bureaus, Congress made it clear that "rate bureau employees should play less of a part in determining carrier rates than the carriers themselves." S. Rep. 96-641, 96th Cong., 2d Sess. 14 (1980) (Senate Report); see also House Report 27. Accordingly, the MCA prohibits a rate bureau from permitting "one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item" (49 U.S.C. 10706(b)(3)(B)(iv)). Meetings at which rates are discussed must be open and rate bureaus must, upon request,

divulge the name of the proponent of a rate and the vote cast by any member carrier (49 U.S.C. 10706(b)(3)(B)(v)).

Section 14(e) of the MCA (94 Stat. 808) provided that a rate bureau could continue to function under previously granted immunity, provided that it submitted a new or amended agreement to the Commission for approval and complied with the requirements of the MCA and any implementing regulations while the agreement was being considered by the Commission (see Pet. App. 10a). The Commission issued an interpretive ruling in December 1980 explaining how it "planned to implement the new statutory guidelines for rate-bureau immunity" and "establish[ing] procedures whereby rate bureaus could submit existing agreements to the Commission for approval under the new standards" (*ATA*, slip op. 2, 3). See *Motor Carrier Rate Bureaus — Implementation of P.L. 96-296*, 364 I.C.C. 464 (1980). In this ruling, the Commission interpreted 49 U.S.C. 10706(b)(3)(B)(iv) and (v) to prohibit rate bureau employees from initiating or submitting rate proposals and from making final determinations to adopt, reject or otherwise dispose of such proposals (364 I.C.C. at 478-481). Rather, the Commission concluded, employee advice "shall be available only as a resource to the party(ies) which actually initiates the tariff proposals" (*id.* at 480).[1]

2. Petitioner National Motor Freight Traffic Association (NMFTA) is a rate bureau. It publishes the National Motor Freight Classification, a tariff containing the

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[1]Shipper and motor carrier interests sought judicial review of various portions of the Commission's order, but not of its interpretation of the statutory provisions at issue here. In *ICC v. ATA, Inc., supra*, the Court upheld that part of the order announcing the Commission's intention to remedy serious rate bureau violations by rejecting the relevant tariffs.

classifications used by approximately 3000 motor carriers.[2] Petitioner National Classification Committee (NCC), an autonomous standing committee of the NMFTA consisting of 100 carriers, is the agency through which the participating motor carriers collectively establish their freight classifications. Pet. 4; Pet. App. 9a. In May 1981, the NMFTA filed an amended agreement intended to comply with the requirements set forth in the MCA and the Commission's interpretive ruling (see pages 2-3, *supra*). Although the NMFTA currently functions in accordance with that agreement, it has not yet been approved by the Commission.[3]

This case involves a challenge by shippers to the NMFTA's reclassification of "fried bacon or pork rinds and skins," which resulted in higher freight rates for the commodity. The shippers alleged that the procedures used by petitioners violated the provisions of the MCA designed to open the ratemaking process and prevent excessive involvement by bureau employees. Full-time rate bureau employees (the National Classification Board or NCB) initiated the proposal in question, recommended that it be docketed, conducted the only hearing on the proposal and recommended its approval. The carriers whose rates were affected by the proposal never met to discuss it. The staff's docketing and approval recommendation were ratified through mail

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[2]Classifications are groupings of commodities of equivalent transportation characteristics, incorporated into so-called "class rate" tariffs published by regional rate bureaus and individual carriers. Thus, while NMFTA does not itself publish actual freight rates, its classification decisions often effectively do set such rates. See Pet. App. 9a n.5; *National Classification Committee* v. *United States,* No. 83-1474 (D.C. Cir. Oct. 26, 1984), slip op. 3, 4.

[3]Over 40 motor carrier rate bureaus filed new or amended rate bureau agreements with the Commission following enactment of the MCA. The ICC has provisionally approved several of these agreements, but has not yet acted on the NMFTA's.

balloting by the 25 carriers on the National Classification Review Committee, a subcommittee of the NCC. The proposal was formally docketed in the name of the NCC itself rather than a particular carrier or shipper. When shippers subsequently invoked their statutory right to know the identity of the "proponent" of the new classification (49 U.S.C. 10706(b)(3)(B)(v)), they were told that it was the NCC. Pet. App. 10a-12a.

Acting on the shippers' protest, the Commission's Suspension Board suspended the proposed classification change and instituted an investigation pursuant to 49 U.S.C. 10708 (Pet. App. 8a). Following an adjudicatory proceeding including the submission of evidence, the entire Commission concluded that petitioners' procedures violated the provisions requiring specific carrier responsibility for tariff proposals set forth in Section 10706(b)(3)(B)(iv) and (v) and the ICC's 1980 interpretive ruling because those procedures afforded the rate bureau employees an impermissible degree of influence and encouraged a passive or "rubber stamp" role for the carriers (Pet. App. 12a-19a). The Commission recognized that the challenged procedures may comply with the NMFTA's unapproved agreement, but reasoned that, in accordance with Section 14(e) of the MCA (see page 3, *supra*), "[u]ntil the Commission completes its review of the NCC agreement, NCC must comply with the applicable law and regulations in order for its actions to receive [the Commission's] approval" (Pet. App. 15a).

The Commission determined that petitioners' procedures were unlawful in the following respects: the proposed reclassification was initiated by the NCB rather than a carrier or shipper (Pet. App. 13a); the proposal was docketed in the name of the NCC rather than an identifiable carrier (*id.* at 13a-14a); rate bureau employees held the only hearing on the proposal and recommended its adoption (*id.* at 15a-17a); and it was approved by a mail vote of the carrier

subcommittee (*id.* at 17a-18a). The Commission found nothing to indicate that the carriers comprising the NCC had exercised any independent judgment on the proposal and "every reason to conclude that the organization is allowing its employees to wield essentially unfettered discretion" in violation of the MCA and its implementing regulations (Pet. App. 16a).

In light of these violations, the Commission ordered on July 20, 1983 that the proposed reclassification, which went into effect on June 11, 1983 (Pet. App. 7a n.1), be cancelled, *i.e.*, prospectively invalidated (*id.* at 19a). On the other hand, the Commission avoided the extreme step of voiding the tariff ab initio and creating a basis for carrier overcharge liability for past shipments based on the full difference between the rejected rate and the last one lawfully in effect. See *ICC* v. *ATA, Inc.*, slip op. 3-4, 5-6. On a petition for review, the court of appeals summarily affirmed, "generally for the reasons stated" by the Commission (Pet. App. 1a-2a).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' claim that review is necessary to provide "legal certitude" is wholly insubstantial; the Commission's decision, affirmed by the court of appeals, clearly specifies what procedures petitioners must follow in order to comply with the law. Review by this Court is unwarranted.

1. Petitioners argue (Pet. 9-12) that the Commission's interpretation of the requirements of Section 10706(b)(3)(B)(iv) and (v) is erroneous. On the contrary, the challenged administrative interpretation of the statute plainly is within the power of the ICC and is consistent with the congressional intent behind the MCA. Just last Term, the Court upheld the Commission's exercise of its discretionary authority under the Act, recognizing the ICC's "key

role in holding carriers to the [MCA] § 14 guidelines" (*ICC* v. *ATA, Inc.*, slip op. 16). The agency action upheld in *ATA* —the implication of a potent remedy not expressly provided for in the statute — was significantly more far reaching than the Commission's interpretation of the express statutory requirements relating to the extent of rate bureau employee involvement in collective tariff-setting activities. This is just the sort of administrative interpretation entitled to substantial deference by the courts. See, *e.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 588 (1982).

Petitioners focus on two of the four findings of the Commission with respect to the lawfulness of their procedures.[4] They contend first that the Commission erred in holding that the employees comprising the NCB should not have made a recommendation to the carriers with respect to the reclassification proposal. In support, they cite (Pet. 10) legislative history noting the value of employee recommendations. But the guiding congressional policy behind the relevant portions of the MCA was to limit the involvement of rate bureaus in favor of more direct carrier determination of tariffs. See page 2, *supra*. The reference relied on by petitioners, then, indicates only that employee recommendations may be appropriate in many instances, not that all such recommendations are per se legal. The Commission's decision is completely consistent with congressional intent. The Commission did not forbid all employee recommendations, but rather determined that the evidence in this particular case showed that the "recommendation" was in reality

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[4]Petitioners apparently do not challenge the ICC's determination that the procedures followed here were unlawful because employees held the only hearing on the proposed reclassification and it was approved by mail vote without discussion by the carriers (see page 5, *supra*). Accordingly, even if they were correct with respect to the two findings that they do challenge, the Commission's order cancelling the tariff would still be proper.

an integral part of a procedure that vested effective control of the ratemaking process in rate bureau employees (see Pet. App. 15a-16a).[5] This factual finding does not warrant review by this Court.

Petitioners also contend that the Commission erred in interpreting Section 10706(b)(3)(B)(v) to prohibit docketing classification proposals in the name of the NCC. This Section requires rate bureaus to divulge, on request, the name of the proponent of a rate and the vote cast by any member carrier. It is not enough, as petitioners argue, that only the votes be made known. Such a reading would render meaningless the separate statutory requirement that the proponent of a rate be identified. It would also undermine Congress's purpose to approximate marketplace restraints on carriers engaged in collective ratemaking, for it would diffuse responsibility for action adverse to shippers among all concurring carriers. See Pet. App. 13a-14a. Indeed, because carriers may vote on classification proposals relating to commodities that they do not carry, a commodity could be reclassified without any identifiable participation by the actual carriers of the commodity. See 49 U.S.C. 10706(b)(3)(B)(ii); *Motor Carrier Rate Bureaus, supra,* 364 I.C.C. at 496-497. The aggregate adverse impact of petitioners' procedural device is apparent from the evidence showing that NCC docketed 144 proposals in its own name and only 20 in the names of individual carriers (Pet. App. 13a n.11). As the Commission noted (*ibid.*), "[t]his suggests that NCC is capable of concealing the identity of a carrier proponent in contravention of the statutory mandate to disclose the identity of proponents." To carry out that

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[5] "It is undisputed that NCC's approval of the pork skins proposal was based on a recommendation by NCB. There is nothing to indicate that [the carriers] exercised any independent judgment on the proposal. Thus, there is every reason to conclude that the organization is allowing its employees to wield essentially unfettered discretion." Pet. App. 16a.

mandate, the ICC reasonably interpreted the statute to forbid docketing in the name of the carrier committee as a whole.[6]

2. Petitioners argue (Pet. 12-14) that their actions should be inviolable because they complied with the rate bureau agreement and that to hold otherwise would place them on the horns of a dilemma, where they would face liability whether or not they complied with that agreement.[7] Petitioners ignore the central fact that their agreement has never been approved by the Commission (see page 4, *supra*). Had it been, the Commission could not find unlawful under Section 10706(b) tariffs formulated in compliance with that agreement.[8] But it is clear under Section 14(e) of the MCA

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[6]Petitioners base their argument on the fact that Congress did not in the MCA undertake to eliminate rate bureaus, specifying that carriers may adopt "procedures for joint consideration, initiation or establishment of [rates and classifications]" (49 U.S.C. 10706(b)(2)). This provision does not limit Section 10706(b)(3)(B)(v) by legalizing committee docketing of proposals as a device to prevent discovery of their true proponents. Joint initiation of rates and classifications is different from docketing, which involves a request that carriers consider initiating a new rate or classification. It is the latter function that is relevant here, and Congress clearly intended that it be carried out by identifiable carriers (see page 2, *supra*). Moreover, the Commission's reading of the statute, even if not compelled by its language, is surely within its interpretive discretion (see pages 6-7, *supra*), especially where, as here, Congress expected that the new statute would "result in a significant change in the way motor carriers price their services" (House Report 28). See generally *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the ICC "is neither required nor supposed to regulate the present and future within the inflexible limits of yesterday").

[7]This argument was not raised before the Commission and therefore should not be considered by the Court. See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). It is, in any event, meritless.

[8]The Commission could, however, reopen the approval proceeding to reconsider whether the agreement complied with the Act. See *ICC* v. *ATA*, slip op. 4-5 & n.3.

that a rate bureau's immunity pending approval of a new agreement depends not just on submission to the ICC of the agreement, but on compliance with the statute and the Commission's regulations (see Pet. App. 10a, 15a; page 3, *supra*).[9] Aspects of the agreement here violate both the statute and the Commission's 1980 interpretive ruling in *Motor Carrier Rate Bureaus, supra,* as petitioners recognized or should have recognized when they submitted their agreement in 1981. The governing statutory and regulatory provisions plainly prevail over those contained in an unapproved agreement. There is neither authority nor reason for granting petitioners immunity in these circumstances simply because the Commission has not yet concluded its complete review of all of the procedures contained in the agreement. The way out of petitioners' self-imposed "dilemma" is simply to amend their agreement to conform to the requirements specified by Congress and the Commission.

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[9]See also 49 U.S.C. 10706(b)(2) (antitrust immunity is available "[i]f the Commission approves the agreement"); House Report 28, 30 (rate bureaus may continue to function only "subject to the provisions of this section" and agreements shall receive ICC approval "only if each of the [restrictions in the Act] are met").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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